(2)

No. 09-1423

In The

Supreme Court of the United States

HORST SCHWINN, Guardian ad Litem of Doerte Hesse, et al.,

Petitioners,

v.

CHARLES STEPHEN EBBETS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the absence of any material facts in dispute concerning the relationship between two parties, may a District Court properly rule, as a matter of law pursuant to Rule 45 of the Federal Rules of Civil Procedure, that one party was an independent contractor for whose negligence the other party could not be held liable?

2. Does Virginia's statutory requirement that a broker must supervise a real estate agent create a *de facto* employer-employee relationship, even where the statute provides that the agent may be an independent contractor?

3. Does a real estate agent's status as an independent contractor present a genuine dispute over a material fact precluding summary judgment if the nature of the broker's supervision over the agent does not relate to the "means and methods" of the agent's work?

PARTIES TO THE PROCEEDING

The Petitioners in this case are Horst Schwinn, Guardian of Doerte Hesse, and Marcus Hesse, Guardian of Josef Hesse. The Respondents are Long and Foster Real Estate, Inc. and Charles Stephen Ebbets.

CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29, Respondent Long and Foster Real Estate, Inc. states as follows:

1. Long and Foster's parent corporation is The Long & Foster Companies, Inc.

2. There are no publicly held companies that own 10% or more of stock of Long and Foster.

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COUNTERSTATEMENT OF THE CASE

This action arises out of a motor vehicle collision involving Charles Stephen Ebbets ("Ebbets"), Josef Hesse and Doerte Hesse ("the Hesses"). The Hesses filed a personal injury action against Ebbets and Long and Foster Real Estate, Inc. ("Long and Foster") in the United States District Court for the Eastern District of Virginia, Alexandria Division, alleging that Ebbets' negligence caused the collision and the Hesses' injuries. The Hesses also asserted that Long and Foster should be held liable for Ebbets' alleged negligence under a theory of *respondeat superior*, arguing that, at the time of the accident, Ebbets, a licensed real estate agent, was an employee and/or agent of Long and Foster working in the scope of his employment.

The parties filed cross motions for summary judgment on the *respondeat superior* issue.[1] The District Court denied the Hesses' motions for partial summary judgment and granted Long and Foster's motion for summary judgment, finding that Ebbets was not acting as an employee of Long and Foster at the time of the accident and, therefore, Long and Foster had no liability for his conduct. The case proceeded against Ebbets on damages only, and after a bench trial, the District Court entered an order awarding judgment in the Hesses' favor. The Hesses appealed this order to the Fourth Circuit Court of Appeals, which affirmed the District Court's well-reasoned opinion. The Hesses then filed a Petition

[1] The Hesses also asked the District Court to rule that Ebbets was negligent as a matter of law. The District Court denied this motion

for Rehearing and Rehearing *En Banc*, which was denied.

REASONS FOR DENYING THE PETITION

Supreme Court Rule 10 provides that a petition for a writ of certiorari will be granted only for compelling reasons; however, the Hesses' Petition does not ask this Court to resolve a conflict within the circuit courts of appeals or address an important federal question that conflicts with a decision by a state court of last resort. The Rule further states that a petition for a writ of certiorari is "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law," yet this is precisely what the Hesses ask this Court to review on appeal. In essence, the Hesses' position is nothing more than an indictment of the summary judgment procedure. As there is no compelling reason for this Court to review the Fourth Circuit's opinion affirming the District Court's decision to grant summary judgment in favor of Long and Foster, the Petition should be denied.

I. Given the Absence of Any Material Facts in Dispute, the Issue of Whether Ebbets is an Independent Contractor was a Matter of Law for the District Court to Decide

The Hesses assert that the District Court, in granting Long and Foster's Motion for Summary Judgment, failed to view the evidence in the light most favorable to the Hesses. They contend that the District Court should have submitted the *respondeat*

superior issue to the jury, and the jury could have drawn different inferences based upon the evidence, and concluded that Ebbets was an employee of Long and Foster. This contention is contrary to the concessions by made the Hesses at the summary judgment hearing before the District Court.

The District Court acknowledged that whether a person is an employee or an independent contractor is generally a question of fact for the jury to determine; however, based upon the evidence before the District Court, there were no material issues of fact in dispute. At the summary judgment stage, the facts must be viewed in the light most favorable to the nonmoving party **only** if there is a genuine dispute as to those facts. *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007). Given the absence of any disputed material facts, the District Court suggested that the independent contractor issue was a legal conclusion upon which the District Court could properly rule.

When specifically asked by the District Court whether this was a correct assessment of the procedural posture of the case, the Hesses agreed. Having made no objection to the District Court's conclusion that the only issue before the Court was a question of law for the Court to decide, the Hesses cannot be permitted to do so on appeal. If there were disputed material facts that could be inferred from the evidence that raised a factual issue for the jury to decide, it was incumbent upon the Hesses to raise the issue and provide the District Court with an opportunity to consider the alleged reasonable inferences and rectify the effect of the asserted error.

In light of the Hesses' concession at the summary judgment hearing that there were no disputed issues of material fact as to Ebbets' status as an independent contractor, it was within the province of the District Court to rule that Ebbets is an independent contractor as a matter of law for whose negligence Long and Foster could not be held liable.

In addition, only **reasonable** inferences need be considered by the District Court. *Sylvia Development Co. v. Calvert County, Maryland*, 48 F.3d 810, 818 (4th Cir. 1995). Whether an inference is reasonable cannot be decided in a vacuum; it must be considered in light of the competing inferences to the contrary. *Id.* The District Court properly considered all reasonable inferences that could be drawn from the material facts and ruled upon a question of law. *Farlow v. Wachovia Bank of North Carolina, N.A.*, 259 F.3d 309, 313 (4th Cir. 2001) ("Resolution of factors as 'to whether an employment relationship or an independent contractor relationship was created' is 'a question of law.'"). As this Court stated in *Farlow*, "Resolution of factors as to 'whether an employment relationship or an independent contractor relationship was created' is a 'question of law.' **Merely because employee and independent contractor status is each supported by certain factors does not bar entry of summary judgment.**" *Id.* (*citation omitted*).

Based upon the evidence before the District Court, reasonable minds could not differ on whether Ebbets is an independent contractor. The undisputed facts established that Long and Foster

did not exercise sufficient control over the means and methods of Ebbets' work to transform the parties' intended independent contractor relationship into an employee relationship. The Hesses suggest that because there was some evidence supporting the non-dispositive factors relating to the *respondeat superior* issue (e.g., right to terminate, non-assignability, indemnification), the District Court should have submitted the issue to the jury. As the Fourth Circuit explained in *Cilceck v. INOVA Health System Services*, 115 F.3d 256 (4th Cir. 1997), however, if the material facts pertaining to the relationship are not in dispute, but only the **significance** of those facts as it pertains to the independent contractor issue, then the "resolution of that debate is a question of law." *Id.* at 261.

Contrary to the Hesses' contention that they were denied their right to a jury trial, where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no issue for the jury to decide. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Summary judgment is not a "disfavored procedural shortcut." *Garrow v. Economos Properties, Inc.*, 406 F. Supp. 2d 635, 639 (E.D. Va. 2005). Rather, the summary judgment procedure is properly regarded as an "integral part" of the Federal Rules of Civil Procedure, which are designed to obtain a just, expeditious and inexpensive resolution of every civil matter. *Id.* A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The nonmoving party must do more than simply show that there is some metaphysical doubt as to the

material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Anderson*, 477 U.S. at 247-48.

In light of the procedural posture of the case, the District Court properly ruled that Ebbets is an independent contractor as a matter of law. *See, e.g.*, *Veitch v. Jenkins*, 107 Va. 68, 57 S.E. 574, 575 (1907) (holding that "[t]he existence and character of the relation between [the plaintiff] and [the general contractor] depending on a written contract unambiguous in its terms, it was within the province of the court to construe the instrument, and as a matter of law to determine the relation between the parties."); *Stagg v. Taylor's Adm'x*, 119 Va. 266, 89 S.E. 237 (1916) (reversing entry of judgment in favor of plaintiff because the "evidence admits of only one conclusion" as to a subcontractor's status as an independent contractor); *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 69, 387 S.E.2d 760, 762 (1990) (affirming trial court's judgment that as a matter of law the defendant could not be held liable for the negligent acts of an electrician, stating that "[w]hen the evidence and all reasonable inferences are viewed in the light most favorable to the [plaintiffs] reasonable minds must conclude that the [general contractor], acting through [the electrician], neither had, nor exercised the power to control the means and methods of [the electrician's] electrical work."); *Cilecek v. Inova Health System Servs.*, 115 F.3d 256, 261 (4th Cir. 1997) (finding that a physician who contracted to provide emergency medical services was an independent contractor as a

matter of law). Thus, the Fourth Circuit properly affirmed the District Court's granting of summary judgment in favor of Long and Foster.

II. Statutorily-Mandated Supervision Does Not Create an Employee-Employer Relationship

The Hesses[2] assert that a jury could have reasonably concluded that Ebbets was an employee of Long and Foster based upon the statutory and regulatory duties imposed on brokers to supervise real estate agents. As an initial matter, however, statutory interpretation is a pure question of law. *Young v. Commonwealth*, 273 Va. 528, 533, 643 S.E.2d 491, 493 (2007). Thus, a broker's statutory duty to supervise a real estate agent did not present a jury issue.

The District Court properly rejected the Hesses' statutory argument for two reasons. First, the statutory definition of "real estate sales person" expressly recognizes that a broker can have an independent contractor relationship with a real estate agent:

> [A]ny person, or business entity of not more than two persons unless related by blood or marriage, who for compensation or valuable consideration is employed either directly or indirectly by, or *affiliated as an independent contractor with*, a real estate broker, to

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[2] Schwinn did not assert this argument as a basis for his Motion for Partial Summary Judgment in the District Court and should not be permitted to do so on appeal.

> sell or offer to sell, or to buy or offer to buy, or to negotiate the purchase, sale or exchange of real estate, or to lease, rent or offer for rent any real estate, or to negotiate leases thereof, or of the improvements thereon.

VA. CODE ANN. § 54.1-2102 (*emphasis added*).

In fact, the Virginia Real Estate Board Licensing Regulations specifically contemplate that a real estate agent will act as an independent contractor. 18 VA. ADMIN. CODE § 135-20-10. If the Virginia General Assembly did not intend to permit a broker and a real estate agent to have an independent contractor relationship, the independent contractor language contained in the statutes and regulations would be superfluous. The language of the statute must be construed so as to give each word meaning, if possible. *Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004). If the Hesses' interpretation were correct, then no real estate agent could ever be considered an independent contractor because all real estate agents must be supervised by a broker pursuant to the applicable regulations. Thus, no reasonable inference can be made regarding Ebbets' status as an employee based upon these statutes and regulations.

Second, the District Court properly concluded that the Hesses "conflate[d] the duty of supervision with the power to control." (20a). Although Long and Foster had a duty to supervise its real estate agents, this duty did not extend to control over "the means and method of performing the work."

Moreover, Virginia's real estate regulations do not impose the type of control the Hesses suggest. As the District Court explained:

> Contrary to plaintiffs' suggestion, the Virginia statutory scheme does not create a *de facto* master-servant relationship between a real estate broker and a salesperson. Instead, these regulations set out broad boundaries within which salespersons may operate and place the onus on the brokers to ensure compliance. They do not, however, implicate the time, place, and manner in which a salesperson may solicit buyers, negotiate a deal, or execute an agreement. Whether a particular salesperson is an employee of a broker or affiliated as an independent contractor turns on the unique circumstances of the salesperson's relationship with his broker.

(21a).

While it is correct that under Virginia law, a real estate agent is required to associate with a licensed real state broker, these regulations do not change a real estate agent's status an independent contractor. *See, e.g., Locations, Inc. v. Hawaii Dept. of Labor and Industrial Relations*, 79 Hawaii 208, 215, 900 P.2d 784, 791 (1995) (holding that brokers' statutorily-mandated control over real estate agents does not create an employment relationship). For example, 18 VAC § 135-20-160(D) states that the supervising broker "shall exercise reasonable and

adequate supervision" of the real estate agents, and such supervision should include "the availability of the supervising broker . . . to review and discuss contract provisions, brokerage agreement provisions and advertising" and "the availability of training and written procedures and policies which provide, without limitation, clear guidance" in certain areas, including handling escrow deposits, compliance with federal and state housing laws, advertising, negotiating and drafting of contracts, etc. These regulations say nothing about control over the means and methods of the agents' work.

Although the Virginia Real Estate Board Licensing Regulations require all real estate agents to associate with a licensed real estate broker who is required by law to supervise the agent, the **nature** of the supervision does not affect the time, manner and method of how real estate agents perform their work. Instead, the responsibilities of a managing broker are to maintain the office operation and supervise real estate agents and administrative staff. The managing brokers act as an available resource in the office to assist or answer questions as needed. The managing brokers are not involved in the sales negotiation process. For example, Ebbets may independently negotiate the commission rate. Ebbets does not confer with the managing broker in drafting settlement documents. Managing brokers do not sign sales contracts. In fact, the managing brokers do not review sales contracts until after the contracts are ratified. The managing brokers only review contracts to ensure the contract language effectuates the buyer and seller's intent and complies with the law.

Real estate agents do not report to the managing brokers; nor do managing brokers keep track of the agents' schedules. Ebbets does not check in or check out with the managing brokers or anyone else at the beginning or end of each work day. According to Ebbets, the managing brokers exercise no meaningful supervision over the means and methods of his work.

> Q: Can you tell me, in general, . . . what kind of supervision your managing broker has provided to you?
>
> A: I really have no supervision. I come and go as I please and I don't come in sometimes, and I come in sometimes at six o'clock in the morning. I can do whatever I want. I've had no conflicts of any type, and I've had no supervision from any of the Long and Foster managers.
>
> Q: They don't supervise contracts or anything else in any other way?
>
> A: They get paperwork and initial off on it or sign off on it. And they may have a question for me, and say, I thought the man's name was John Q. Jones, and you put John P. Jones, and that kind of a thing. I'm never told to do anything.

Q: Are you ever told how you should go about sales or how you should go about marketing?

A: No.

Q: Are you ever told how you should go about contract presentations?

A: No.

While a broker may have a statutory duty to supervise a real estate agent, the broker's supervision does not involve the power to control the means or method of the agent's work. The degree of supervision exercised by Long and Foster's managing brokers over real estate agents is consistent with the real estate agents' independent contractor status. Thus, the District Court properly ruled that no reasonable jury could have concluded that Ebbets was an employee of Long and Foster based upon the statutory and regulatory duties imposed on brokers to supervise real estate agents.

III. Long and Foster Did Not Have the Power to Control the Means and Methods of Ebbets' Work

The doctrine of *respondeat superior* imposes liability on an employer for the negligent acts of its employees. *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 81, 486 S.E.2d 299, 301 (1997). It is well-settled under Virginia law, however, that if the negligent acts were performed by an independent contractor, then no master-servant relationship exists and the putative employer is not

liable for the independent contractor's negligent acts. *Id.*; *Sanchez v. Medicorp Health System*, 270 Va. 299, 618 S.E.2d 331 (2005); *Norfolk & W. Ry. Co. v. Johnson*, 207 Va. 980, 154 S.E.2d 134 (1967); *Smith v. Grenadier*, 203 Va. 740, 127 S.E.2d 107 (1962).

There are four factors that must be considered in determining whether an individual is an employee or an independent contractor: (1) selection and engagement; (2) payment of compensation; (3) power of dismissal; and (4) power to control the work of the individual. *McDonald*, 254 Va. at 81, 486 S.E.2d at 301. **The fourth factor, the power to control, is determinative.** *Id.* (*citing Hadeed v. Medic-24, Ltd*, 237 Va. 277, 288, 377 S.E.2d 589, 594 (1989)). This factor refers to control over the means and methods of performing the work. *Baker v. Nussman & Cox*, 152 Va. 293, 147 S.E. 246 (1929). If only the result is specified, and the individual may adopt such means and methods as he or she chooses to accomplish the result, then that individual is an independent contractor. *Craig v. Doyle*, 179 Va. 526, 531, 19 S.E.2d 675 (1942). Long and Foster does not dispute the Hesses' contention that the actual exercise of control is not required, only the right to exercise control; however, the Court must evaluate Long and Foster's right to control as it existed at the time of the accident. *Coker v. Gunter*, 191 Va. 747, 750, 63 S.E.2d 15, 16 (1951).

A. The Independent Contractor Agreement Defined the Relationship Between Ebbets and Long and Foster

It is customary in the real estate industry for brokerage firms to enter into independent contractor agreements with real estate agents. *Long & Foster Real Estate, Inc. v. NRT Mid-Atlantic, Inc.*, 357 F. Supp. 2d 911, 913 (E.D. Va. 2005). Consistent with this uniform practice, the express language of the Independent Contractor Agreement in the instant matter illustrates the unambiguous intent of Long and Foster and Ebbets with respect to Ebbets' status as an independent contractor. The Independent Contractor Agreement expressly states that Ebbets "is under the control of Broker as to the result of Associate's work only, and not as to the means by which such result is accomplished." In fact, when asked to characterize his relationship with Long and Foster, Ebbets admitted that he is an independent contractor, stating, "I'm an independent contractor and I get to work in a Long and Foster office." The Long and Foster Policy Manual also emphasizes that real estate associates are independent contractors, not employees:

> A real estate associate affiliated with Long & Foster whose personal income is derived from the commissions of the listing, sale or leasing of real estate is an **independent contractor**. As an independent contractor, each associate may establish his or her own hours and methods of working without control or direction from Long & Foster. Long &

> Foster associates will be supervised and assisted, in accordance with state regulatory requirements, by Branch Managers and Principal Brokers. This supervision shall not be deemed nor construed to create an employer/employee relationship.

(JA 892) (*emphasis in original*).

The Hesses argue that Long and Foster's Policy Manual imposes restrictions on Ebbets. As detailed below, however, these controls do not relate to the means and methods of Ebbets' work. Moreover, Clause Eighteen of the Independent Contractor Agreement explicitly states that if there is a conflict between the Agreement and the Policy Manual, the Agreement shall control. Thus, to the extent that the Policy Manual could be construed as controlling Ebbets' work, the Agreement expressly provides that Long and Foster shall have no such control over Ebbets.

The Hesses contend that the District Court gave undue significance to the parties' intent and understanding of their relationship. Courts have found the parties' intent, as evidenced by the applicable contract language, to be a persuasive factor in support of a party's independent contractor status. *See, e.g.*, *Mangram v. General Motors Corp.*, 108 F.3d 61, 63 (4th Cir. 1997) (holding that a Memorandum of Understanding specifically providing that plaintiff was not an employee contributed to finding independent contractor status); *Adcock v. Chyrsler Corp.*, 166 F.3d 1290, 1293 (9th Cir. 1999) (affirming summary judgment

in favor of defendant where the contract contained clear language that the plaintiff would be considered an independent contractor, not an employee); *Walker v. Johnson*, 278 Ga. App. 806, 813, 630 S.E.2d 70, 76 (2006) (stating that "[w]here the contract of employment clearly denominates the other party as an independent contractor, that relationship is presumed to be true unless the evidence shows that the employer assumed such control.").

The Fourth Circuit has previously held that the parties' actual understanding of their working relationship is another factor that should be considered in determining whether an employment relationship was intended. *Farlow*, 259 F.3d at 314 – 315; *Cilecek*, 115 F.3d at 261; *Robb*, 80 F.3d at 893; *see also Restatement (Second) of Agency* § 220(2)(i) ("In determining whether one acting for another is a service or an independent contractor," the fact of "whether or not the parties believe they are creating the relation of matters and servant" is considered.).

The District Court properly considered the Independent Contractor Agreement to determine the intent of the parties to establish an independent contractor relationship rather than an employer/employee relationship. *Richmond Newspapers, Inc. v. Gill*, 224 Va. 92, 98, 294 S.E.2d 840, 843 (Va. 1982) (concluding that a route carrier was an independent contractor based upon the parties' written contract). In reference to the provision of the Independent Contractor Agreement that sets forth the nature of Long and Foster's control over how Ebbets performs his work, the District Court correctly concluded that Long and Foster had no authority to control the performance

of Ebbets' work, stating that the Independent Contractor Agreement demonstrated a "hands-off association" which is "the *sine qua non* of an independent contractor relationship." (23a).

B. Real Estate Agents are Independent Contractors Under the Proper Application of the "Control" Test

Real estate agents are consistently treated as independent contractors under federal and state law. Real estate agents are not afforded the protections under anti-discrimination statutes that are available to employees. *See, e.g., Kakides v. King David Agency, Inc.*, 283 F. Supp. 2d 411 (D. Mass. 2003) (granting defendant's motion for summary judgment on real estate broker's Title VII claim against real estate agency, finding that the broker was an independent contractor). Moreover, both the Virginia Workers' Compensation Act and Internal Revenue Code specifically exclude real estate agents from the definition of employee if their remuneration is based on sales rather than number of hours worked and their contract provides that the agent will not be treated as an employee for federal tax purposes. VA. CODE ANN. § 65.2-101; 26 U.S.C. § 3508.

Ebbets would not be considered an employee under these statutes because he was paid on a commission basis, his written contract designated him as an independent contractor, and the contract provides that he was not an employee for federal and state tax purposes. Ebbets' IRS 1099-MISC forms demonstrate that Ebbets was compensated as a non-

employee and Long and Foster did not withhold any income, FICA, FUTA, or federal or state taxes from Ebbets' commissions. Although these factors are not dispositive, "[t]he parties' tax treatment of the employment relationship is highly indicative, and may even constitute a 'virtual admission' of the hired party's status." *Tagare v. NYNEX Network Systems Com.*, 994 F. Supp. 149 (S.D. N.Y. 1997); *Aymes v. Bonelli*, 980 F.2d 857, 862 (2d Cir. 1992) (holding that failure of hiring party to pay payroll taxes or withhold income taxes as "highly indicative that [hired party] was considered an outside independent contractor.").

Even though (1) the Independent Contractor Agreement expressly states that Ebbets shall be treated as an independent contractor, (2) Ebbets has considered himself an independent contractor with Long and Foster for the last seven years, and (3) during that time he has received none of the benefits or protections that are afforded to employees under federal and state law, the Hesses still contend that Long and Foster should be held liable for Ebbets' alleged negligent acts under a theory of *respondent superior*. Not only does this argument ignore the parties' contractual intent pursuant to the Independent Contractor Agreement and the substantial body of federal and state statutes and regulations treating real estate agents as independent contractors, it is contrary to the undisputed facts of this case, which establish that Long and Foster exercised no control over the means and methods of Ebbets' work.

To transform Ebbets from an independent contractor into an employee, the Hesses must show

that the amount of control exercised by Long and Foster was substantial. The application of this "control" test is aptly illustrated by *MacCoy v. Colony House Builders, Inc.*, 239 Va. 64, 387 S.E.2d 769 (1990). In *MacCoy*, the Supreme Court of Virginia held that the trial court correctly determined as a matter of law that an electrician was an independent contractor for whose negligence a general contractor was not responsible. The general contractor provided the electrician with all materials and told the electrician what appliances, fixtures outlets and switches were to be installed and their location. The general contractor decided which of the twenty-two houses the electrician would work on each day and set the completion dates. The general contractor was present on the job site every day and if the work appeared to be unsatisfactory, he had the option to terminate the electrician.

Even so, the Supreme Court of Virginia concluded that that the electrician was an independent contractor as a matter of law, stating that "[n]one of these facts, however, even when taken together, would justify an inference that [the general contractor] had the power to control the means and methods of [the electrician's] work." 239 Va. at 68, 387 S.E.2d at 762. Instead, the Court reasoned, the general contractor "merely prescribed what the results should be," and the electrician "was free to adopt and employ the means and methods necessary to accomplish the prescribed results." *Id.* Accordingly, the Court concluded that even viewing all evidence and reasonable inferences in a light most favorable to the plaintiffs, reasonable minds must conclude that the electrician was an independent contractor.

Numerous courts in other jurisdictions have held that real estate agents are independent contractors under the control test even if the brokers exercise some degree of control because the agents are paid by commission, use their own vehicles, set their own hours, and are dependent on their own efforts to sell real estate. For example, in a factually similar case, *Eads v. Kinstler Agency, Inc.*, 929 S.W.2d 289 (Mo. App. 996), the plaintiff filed an action against a real estate agent and a real estate agency to recover damages for personal injuries resulting from an automobile collision with the agent. At the time of the accident, the agent, whose license was associated with the brokerage, was going to see a customer about a listing. However, the brokerage did not require the agent to keep regular work hours or perform any services at the agency's office. The agent furnished her own transportation and she did not receive an allowance or reimbursement for use of her automobile. The agent also had "entire discretion" in handling leads and prospects and as to the means of securing listing and consummating negotiations. Moreover, the "Broker and Salesperson Agreement" between the agent and the agency stated that the agent was to be treated as an independent contractor and not as an employee for tax purposes. Under the facts, the Missouri Court of Appeals held that the trial court did not err in granting the agency's motion for summary judgment on the grounds that the agent was an independent contractor for whose negligence the agency could not be held liable. *Id.* at 292.

Similarly, in *Verdecchia v. Douglas A. Prozan, Inc.*, 274 F. Supp. 2d 712 (W.D. Pa. 2003), the United States District Court for the Western District of

Pennsylvania granted summary judgment in favor of a real estate firm and its individual owner, finding that the defendants were not "employers" under the Americans with Disabilities Act or Age Discrimination in Employment Act because their real estate agents were independent contractors under the control test. *Id.* at 722. In making this finding, the Court noted that the Broker-Salesperson Contract designated the salesperson as an independent contractor. *Id.* at 721. The real estate agents were responsible for their own disability insurance, public liability and property damage insurance, and errors and omissions insurance. *Id.* The agents had no set hours and did not have to account for their time; nor did they have any "floor time" requirements in the office. They were paid on a commission basis and no taxes were withheld from their pay. *Id.* at 722. Although the firm provided agents with a desk and office supplies, the agents were not given an expense account or an allowance. *Id.* Although advertising was done through the real estate firm, the agents were responsible for ensuring that the listed properties were advertised. The agents had to pay for special advertising, certain individual marketing expenses, and distribution of marketing materials. Given these facts, the *Verdecchia* Court held that there was no genuine issue of material fact that the agents were independent contractors, not employees, and, therefore, summary judgment on the ADA and ADEA claims in favor of the defendants was appropriate. *Id.* at 724.

In other cases where the real estate broker exercised even more control over the real estate agent, courts have still found the real estate agent to

be an independent contractor as a matter of law. In *Stetka v. Hunt Real Estate Corp.*, 859 F. Supp. 661 (W.D.N.Y. 1994), Hunt required the plaintiff, a real estate agent, to work "floor time" in the office twice a week for a two-hour period. She was also required to attend weekly sales meetings and house tours. Hunt provided the real estate agents with scripts in speaking with potential clients. *Id.* at 667. It also conducted performance evaluations of the agents. *Id.* at 664. On the other hand, the Court noted that the plaintiff signed an Independent Contractor Agreement, paid her own fees, and her time at work (other than floor time) was "unstructured." The plaintiff was also paid by commission, and Hunt did not make any deductions for federal or state taxes. *Id.* The Court held that these factors established that the plaintiff worked autonomously, with minimal requirements from Hunt, and therefore, the plaintiff was an independent contractor as a matter of law, not an employee entitled to bring an action for sex discrimination under Title VII.

Likewise, in another real estate agent case, *Breen v. Hunt Real Estate Corp.*, 1994 WL 417017 (W.D. N.Y. 1994), the United States District Court for the Western District of New York held that there was no genuine issue of material fact as to the plaintiff's status as an independent contractor, even though (1) the plaintiff was not allowed to work for another real estate broker while she was working for Hunt; (2) she was required to serve "floor time" in the office twice a week and attend sales meeting and house tours; (3) Hunt had authority to rewrite her sales contracts; (4) Hunt placed and paid for advertisements in the newspaper and other publications promoting sales of listings from its sales

associates; and (5) Hunt provided the plaintiff with business cards, a computer, a telephone, microfiche, office supplies and a desk.

As in *Stetka*, the *Breen* Court still found that Hunt did not exercise sufficient control over the plaintiff to create an employment relationship. Specifically, the Court noted that the plaintiff did not have a schedule of working hours other than floor time, she was required to pay her own fees and business expenses, she marketed her own listing, she was expected to develop her own business leads, she was paid on a commission basis, no taxes were deducted from her gross commission payments, and she was not covered by a worker's compensation policy. Therefore, the Court concluded that the plaintiff did not have an employment relationship with Hunt and granted the defendant's motion for summary judgment. *Id.* at *7.

Lastly, in *Krijn v. Pogue Simone Real Estate Co.*, 752 F. Supp. 102 (S.D.N.Y. 1990), *aff'd without opinion*, 930 F.2d 910 (2d Cir. 1991), the Court dismissed the plaintiff's Title VII action on the ground that she was an independent contractor. Although Pogue Simone required attendance at weekly sales meetings and periodic attendance in the office, the Court noted that the plaintiff was paid on a commission basis and the defendant did not control the plaintiff's day-to-day hours or details of the plaintiff's real estate work. Because the defendant broker retained only minimal control over its real estate agents, the plaintiff was an independent contractor. *Id.* at 104.

The instant matter is indistinguishable from *Eads*, *Verdecchia*, *Stetka*, *Breen* and *Krijn*. Ebbets is not required to maintain a fixed schedule or a minimum number of hours of work. In fact, Ebbets testified that Long and Foster imposes no minimum requirements on real estate agents concerning hours or sales:

> Q: Does Long and Foster have any requirements in order to maintain the relationship with them relative to time in the office, sales, or anything of that nature?
>
> A: No.
>
> Q: So you could have your license with them and essentially not show up in the office for six months, have one listing, and continue to keep your license with them?
>
> A: Yes.

Long and Foster does not limit the counties in which Ebbets may list or sell properties. In addition, Long and Foster does not direct the methods Ebbets uses to list or show properties, other than requiring real estate agents to comply with the applicable law. Long and Foster does not dictate how Ebbets spends his work day. Nor is Ebbets required to attend any sales training or other meetings. Ebbets was free to come and go as he pleased, and how he worked an

existing listing or marketed a new listing was within his sole discretion:

> Q: Did Long and Foster dictate what you would do during your work day?
>
> A: No.
>
> Q: So you were free to decide whether you were going to work on an existing listing or to secure a new listing?
>
> A: I could do whatever I wanted to do.
>
> Q: And did Long and Foster, at all, dictate the means or methods that you – of how you would work an existing listing or market a new listing?
>
> A: No.

The Hesses assert that the District Court failed to consider the inferences that could be drawn from the fact that Long and Foster's relationship with Ebbets was terminable at will; however, this factor is not determinative.[3] For example, in *Stith v.*

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[3] The issues of non-assignability and indemnification are also not determinative. In addition, the District Court correctly held that the existence of the indemnification and insurance provisions in the Agreement were indicative of an independent contractor relationship, as Long and Foster has an interest in protecting itself from exposure in lawsuits based upon the actions of its independent contractors.

Thorne, 488 F. Supp. 2d 534 (E.D. Va. 2007), the Court recited the factors to be considered in determining whether employment relationship exists and concluded that the power of dismissal factor is "not essential to the existence of the relationship; the fourth, the power of control is dispositive." 488 F. Supp. 2d at 550; *accord Cilecek*, 115 F.3d at 262 (affirming the district court's grant of summary judgment in favor of the employers on the independent contractor issue, finding that the right to terminate was not indicative of the relationship). In evaluating the evidence presented on the issue of power of control, the District Court found that this issue was dispositive. Accordingly, the fact that Long and Foster could terminate Ebbets did not present a material issue of fact that would preclude summary judgment in favor of Long and Foster.

Although Ebbets was provided with Long and Foster's Policy Manual and was required to acknowledge receipt of the same, the mere existence of a policy manual does not, in and of itself, create a master-servant relationship. In *Bartlett v. Northside Realty Associates, Inc.*, 191 Ga. App. 10, 380 S.E.2d 744 (1989), the Georgia Court of Appeals concluded that the policy manual did not alter a real estate agent's status as an independent contractor. In *Bartlett*, the agents were directed to follow the policies contained in the written policy manual and the broker had the right to sever its relationship with salespersons who failed to abide by those policies. However, in affirming the trial court's decision granting summary judgment in favor of the broker on the *respondeat superior* issue, the court found that the policies in the manual did not control "the time, manner and method of performance," and

any other alleged indicia of control were "so inconsequential when viewed in light of the evidence to the contrary to establish no genuine issue of fact." *Id.* at 746.

Thus, the District Court correctly characterized the issue in this case as not whether Long and Foster had *any* administrative policies and procedures, but whether Long and Foster's policies and procedures exerted control over the means and methods of Ebbets' work, as opposed to the results of that work. *See, e.g., Walker v. Johnson*, 278 Ga. App. 806, 813, 630 S.E.2d 70, 76 (2006) (distinguishing between the right to control the salesperson's "time, manner and method of executing the work" from the "right to merely require certain definite results in conformity to the contract."). As the Fourth Court explained in *Farlow*, the "right to control" issue pertains to the degree of control over the services rendered, not the "peripheral, administrative details which were incidental to the rendering of . . . services." 259 F.3d at 313 (*citing Robb v. United States*, 80 F.3d 884, 889 (4th Cir. 1996)). Similarly, in *Cilecek*, a case involving a contract physician who provided emergency medical services to hospital, this Court affirmed the district court's grant of summary judgment in favor of the employers on the grounds that the physician was an independent contractor, even though the physician was required to adhere to the hospital rules and regulations which regulated the physician's work in "substantial detail." 115 F.3d at 261.

Ebbets' success as a real estate agent is entirely dependent upon his own initiative, efforts and skill. He works on his own time and at his own

expense, deriving his remuneration from the results of his work. Therefore, the evidence in this case leads to only one conclusion: Ebbets is an independent contractor, not an employee. Ebbets has the freedom to operate his real estate business when and how as he sees fit without interference from Long and Foster.

Applying the four-prong control test established by the Supreme Court of Virginia in *McDonald v. Hampton Training Sch. for Nurses*, 254 Va. 79, 486 S.E.2d 299 (1997), the Hesses concede that Ebbets was paid by commissions only, which is a strong indication of his status as a non-employee. Instead, the Hesses rely on two of the four prongs, noting that Long and Foster has the option to engage or terminate a real estate agent. However, only the fourth prong, the power to control, is determinative. *McDonald*, 254 Va. at 81, 486 S.E.2d at 301.

This is a critical distinction because the Long and Foster "controls" identified by the Hesses have no effect on the real estate agent's means and methods of performing his work. For example, policies and procedures concerning parking, how money should be deposited, maintenance of errors and omissions insurance, the use of Long and Foster's logo, the ownership of records, files or correspondence, shutting off the office lights, etc., do not alter the means and methods Ebbets used to sell or list properties.

Other Long and Foster "controls" relied upon by the Hesses are merely suggestions or recommendations, or an incorporation of the applicable law. For example, although Long and

Foster reserves the right to approve advertising to ensure compliance with applicable law, real estate regulations and ethical standards, the means and methods of advertising is still within the discretion of the real estate agent. In fact, there is no requirement that real estate agents must advertise *at all*.

In support of their position, the Hesses rely on a Virginia circuit court case, *Steffan v. Freemason Assocs., Inc.*, 60 Va. Cir. 216 (2002) (Norfolk). *Steffan* is contrary to the common law in several respects. First, many of the factors identified by the court as an indication of RE/MAX's control over its agents were provisions required by law. Second, the *Steffan* opinion fails to properly distinguish control over the means and methods of the agents' work, as opposed to the results of the agents' work. Third, the court failed to give proper weight to the treatment of a real estate agent in the operative documents, which is a strong indication of the agent's independent contractor status. *See, e.g., Mangram v. General Motors Corp.*, 108 F.3d 61, 63 (4th Cir. 1997); *Adcock v. Chyrsler Corp.*, 166 F.3d 1290, 1293 (9th Cir. 1999); *Walker v. Johnson*, 278 Ga. App. 806, 813, 630 S.E.2d 70, 76 (2006).

Steffan is a circuit court opinion, and the numerous and more well-reasoned opinions from the Supreme Court of Virginia and federal courts cited by Long and Foster are based upon facts nearly identical to this case. In fact, even in cases where the broker exercised more control over its real estate agents than Long and Foster exercises over its agents, courts have still found the real estate agent to be an independent contractor as a matter of law. *Eads v. Kinstler Agency, Inc.*, 929 S.W.2d 289 (Mo.

App. 996); *Verdecchia v. Douglas A. Prozan, Inc.*, 274 F. Supp. 2d 712 (W.D. Pa. 2003); *Stetka v. Hunt Real Estate Corp.*, 859 F. Supp. 661 (W.D. N.Y. 1994); *Breen v. Hunt Real Estate Corp.*, 1994 WL 417017 (W.D. N.Y. 1994); *Krijn v. Pogue Simone Real Estate Co.*, 752 F. Supp. 102 (S.D. N.Y. 1990), *aff'd without opinion*, 930 F.2d 910 (2d Cir. 1991). Accordingly, given the absence of any controls on the "means and methods" of Ebbets' work, the District Court correctly ruled that Ebbets is an independent contractor as a matter of law.

CONCLUSION

The Petitioners present no compelling reason for this Court to review this case. Accordingly, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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